No. A 22358

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD LEE MEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court
For The State Of Oregon

APPELLANT'S OPENING BRIEF

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QUESTION PRESENTED

Was the appellant, RONALD LEE MEYER, fairly and justly convicted of violating the "Dyer act" in the District Court for the State of Oregon?

SUMMARY OF CASE

The appellant, along with the co-defendant, Donald Edward Campbell, was charged in the trial court with a three

count indictment alleging the receiving, concealing, and selling certain motor vehicles which were moving in interstate commerce and which the defendants allegedly knew to have been stolen in violation of Title 18, section 23.13 United States Code.

The facts show that the indictment was returned by the grand jury on April 7, 1967.

The Government adopted the position that the defendants were involved in a "salvage operation" simply defined as the defendants purchasing salvage vehicles, thereafter removing the serial tags and license plates which constituted the title identity of the vehicles and thereafter placing said license plates and serial tags on other vehicles, which had been allegedly stolen, thereby altering the true title of the stolen vehicles which were allegedly sold by the defendants.

The Government intended as stated by the Government in a trial memorandum submitted to the trial court to establish their case by the testimony of various witnesses, by the introduction of records of used car dealers through the Business Records Act, and by the testimony of an F.B.I. agent, Max E. Taylor.

Additionally, the Government intended, and was successful in bringing before the jury, certain materials including a pop rivet gun and other items, said materials having been removed from the automobile owned by appellant Meyer.

The Government contended further that the initial arrest of Meyer on February 13, 1967, was lawful in that the arresting

warrant had been issued out prior to the arrest. In the Government's trial memorandum, they support this contention because the arrest warrant issued following the filing of a complaint. Thereafter, the Government proposed that the search of the vehicle producing the pop rivet gun and other materials was lawful as a normal incident of the arrest of the appellant.

Other matters were included in the Government's trial memorandum which are not considered relevant for the purpose of this appeal.

A review of the transcript of the proceedings before the United States District Court for the State of Oregon reveals the following factual portions and will hereafter be referred to as "TP."

ARGUMENT

It is appellant's intention to cite for the benefit of this Honorable Court, extracts from the transcript of proceedings to establish that error was committed in the trial court and that said error prejudiced the appellant thereby denying him the right to a fair trial and influencing the jury in their arrival at his determination of guilt.

First of all, the F.B.I. agent was allowed to sit at counsel's table throughout the proceedings, over the objection

of appellant's trial counsel, (page 10 TP), thereby lending undue influence upon the jury and identifying the chief witness against the parties as more than a mere witness and lending dignity to his ultimate testimony inconsistent with defendants' right to impartiality.

Prior to the commencement of the trial before the jury, there were certain agreements made regarding evidence to be admitted under the Business Records Act, said conversation between the Court and trial counsel occuring between pages 3 and 7 of the transcript of the court proceedings.

The trial judge made the observations on page 4, lines 13, 14 and 15 (TP) that he would not pass on admissibility of the records to be introduced. However, on page 17, it is reflected that when counsel for appellant made an inquiry concerning admissibility, the judge answered, "I am completely shocked,", and made statements (page 17 TP) which were obviously prejudicial to defendant in that his trial counsel was lectured and chided for raising the objection, the trial judge contending that all problems of admissibility had been determined, which is simply not the state of the record.

In all events the records were admitted, although the record is replete with the fact that at no time was there established the necessary qualifications to admit said records, namely that they were not exceptions to business practice, nor the producing of parties to testify as to chain of custody of said

records and proper parties to testify as to their capacity in maintaining and processing said records.

Commencing at page 49 (TP) testimony was given as to the witnesses having been shown photographs of various persons for the purpose of identification of the defendants, and admittedly the photographs were between five and seven in number and admittedly all photographs were not similar to the defendant or appellant, but in contrast, photographs were shown of parties who looked nothing like the appellant, leading the witnesses to identify the appellant as the party who had purchased vehicles and allegedly removed title thereto, all of which was again leading and suggestive by the investigating agent of the F.B.I. and prejudiced the appellant. A witness was produced by the Government, namely, Harry French, a detective with the Seattle Police Department who on page 92 (TP) testified that the photographs were not similar to the appellant although he showed them all on several occasions to the witnesses and this unfair use of dissimilar and repeated showing of the photographs to the witnesses, influenced the witnesses improperly in their ultimate identification of the appellant as shown by hesitation in identification by the witnesses on page 94 (TP).

Commencing at page 119 (TP), there is testimony by Martin Wright, a witness for the Government as to statements made by defendant Campbell which did lead the jury to believe

that a conspiracy existed for purposes of sale of stolen vehicles, all to the great prejudice of the appellant inasmuch as the evidence was heard by the jury with respect to the appellant and the testimony was not confined to defendant Campbell, but allowed in for all purposes.

On page 173 of the transcript, there commences testimony by Frank Perry, a member of the Washington State Patrol who testified as to the original arrest of the appellant on February 13, 1967. His testimony at page 174 indicates that the appellant had heretofore been arrested by two troopers of the same agency, although no probable cause was provided nor any justification for the arrest. The two troopers were not called as witnesses and as far as appellant is informed, he at that time, understood that no arrest warrant was in existence. The Government in its trial memorandum justified this arrest by saying that the arresting officers were informed that a lawful warrant for arrest had been issued and the Government propounded that it was lawful because the warrant issued following the filing of an attached complaint, whereas this case was presented by grand jury indictment and a true bill was not returned until April 7, 1967, some two months after appellant's original arrest. This is critical because certain items were then removed from appellant's car on the following day of his arrest, namely, February 14, 1967, and were utilized in the trial to a great extent, to-wit: testimony with

reference to said items by various witnesses, the fact that said items rested on the counsel table throughout the trial and were constantly referred to. These items were materials allegedly used to remove serial tags from salvage vehicles and although the court ultimately ruled out the admissibility of these items, the harm had befallen, at least with respect of influencing the minds of the jurors to the prejudice of the appellant.

The Court, in fact, sustained an objection (page 220 TP), to the search of the vehicle because the Government did not establish that from the time of the appellant's initial arrest on February 13, 1967, and the search of the vehicle on the following day, that the vehicle was not inaccessible, but again the sustaining of that objection after the trial had proceeded nearly to the conclusion of the Government's case had no meaningful effect in erasing from the minds of the jury, the prejudicial impact of the paraphernalia. Later, at page 246 of said transcript, the Court reversed, believing that proper inaccessibility had been established, and let the property into evidence.

Still further problems were raised regarding the items received from the search of appellant's car in that the F.B.I. agent sent those items to Washington, D.C. for apparent examination, but no chain of custody was established which the trial court recognized by its comment on page 74, lines 20 through 25 of said transcript. In the indictment sought by the Government, it was charged that the defendants knew that the

vehicles ultimately sold by them were stolen. However, the trial court refused to give a requested instruction sought by counsel for appellant, said instruction being as follows:

> "If you find that the defendant RONALD LEE MEYER was participating as a partner, or was otherwise associated in a business venture with defendant DONALD EDWARD CAMPBELL, and as a result of this arrangement believed that the defendant DONALD EDWARD CAMPBELL had lawfully acquired the motor vehicles in question and had a right to sell and dispose of such motor vehicles, then the defendant RONALD LEE MEYER would have no knowledge of the stolen character of these motor vehicles, and it would be your duty to return a verdict of 'not guilty' as to RONALD LEE MEYER."

The refusal to give said instruction was tantamount to the Court saying to the jury that we presume the vehicles were stolen, whereas the knowledge of defendants regarding said theft was critical to the establishment of the Government's case and clearly prejudicial to the appellant.

Counsel for appellant also took exception to an instruction read to the jury by the trial court, the effect of said instruction being that the defendants presumably knew of the theft of said vehicles and reading the two instructions together,

namely, the one given by the court and the one refused by the Court could clearly establish that the jury was not instructed to make an actual finding as to knowledge of theft.

This argument presented by counsel at the trial court is recited at page 430 and 431 of the transcript of the court proceedings.

CONCLUSION

As can clearly be seen by the argument presented, the appellant was not granted a fair trial for the following reasons:

1. Improper conduct of the trial judge
2. Denial of due process
3. Improper authentication and qualification of business records
4. Testimony of uncorroborated admissions by co-defendant
5. Illegal search and seizure
6. Unlawful arrest.

WHEREFORE, appellant prays this Honorable Court render its decision reversing the determination of guilty and remanding this matter for further proceedings in the trial court.

Dated: May15, 1968

Respectfully submitted,

BECKER & MOORE

By: Darrell E. Moore

Attorneys for Appellant

CERTIFICATE

I certify, that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Darrell E. Moore

DARRELL E. MOORE